Environmental Law & Litigation

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Environmental Issues in Utility Privatization

U.S. AIR FORCE

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2 Issues

- **Regulatory Status of Privatized Facilities**
  - **1. Applicability of Domestic Sewage Exclusion**
    - **U.S. Air Force Academy**
      - Desire to Sole Source the Privatization
  - **2. Continued Permit Responsibility**
    - **Robins AFB**
      - Desire to receive exemption from privatization requirement

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Domestic Sewage Exclusion (DSE)

- 42 U.S.C. §6903(27)
  - exclusion from definition of solid/hazardous waste for materials in domestic sewage
- 40 C.F.R. §261.4(A)(1)(ii)
  - DSE applies to mixture of domestic sewage and other wastes that passes through a sewer system to a Publicly Owned Treatment Works (POTW)
- Prior to FFCA
  - Federally owned = privately owned
  - DSE did not apply

Federal Facility Compliance Act (FFCA) of 1992

- **FFCA's stated purpose**
  - **Treat Federal facilities in the same manner as all other entities (*e.g.* subject to fines and penalties)**
- **Problem:**
  - **DSE not available to Federally owned WWTPs**
- **Solution:**
  - **FFCA, §108 (42 U.S.C. §6939e)**
    - **conditional exclusion for wastes that are:**

      (1) Discharged into a Federally Owned Treatment Works (FOTW); and

      (2) Satisfy Pretreatment Requirements

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Status of Privatized FOTWs

- **Sold to Municipality**
  - **FOTW is converted to a POTW**
    - **Domestic Sewage Exclusion Still Applies**
- **Sold to Private Entity**
  - **Domestic Sewage Exclusion inapplicable**
    - **Potential for Hazardous Waste in System**
    - **Cost of Operation may be greatly increased**
    - **Economic Viability???**

2 Alternatives

1. **Seek Exemption**
   - **Available in 2 Circumstances**
     1. **Economically Infeasible**
     2. **Unique National Security Concerns**

2. **Limit Competition**
   - **Limited Sourcing**
   - **Sole Source**

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Competition

- **10 U.S.C. § 2688**
  - **Mandates competition if more than one entity is interested**
    - **Limited Exception Adopted by FY 01 Authorization Act**
      - Normal J&A Process, 10 U.S.C. § 2304

        (1) SECDEF determination that it is necessary in the public interest

        (2) 30 days notice to Congress

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Competition (cont.)

- **Sole Source Authority**
  - **May be the Answer**
  - ***BUT*** **DoD Has Strong Preference for Competition**
    - **Defense Reform Initiative Directive (DRID) # 49**
    - **DoD(GC) Opinion**
    - **GAO Decision**

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Continued NPDES Permit Responsibility

- **Sale of System to a Municipality = Transfer of Liability**
  - **Regulators willing to transfer NPDES permit**
    - **Enforceable Pretreatment standards required**
    - **Municipalities = More reliable entities**
  - **Discharge to POTW ≠ NPDES discharge**
- **Sale of System to Private Entity = Retention of Liability**
  - **Discharge Considered Direct**
  - **NPDES Permit Required (co-permit)**
  - **Joint and Several Liability**

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Co-permittee Status

- **Seek Exemption**
  - **Possible Basis: Economically Infeasible**
    - **Requires a SECAF Determination that:**
      - **demonstrated lack of market interest**
      - **long-term cost > long-term benefit**
      - **long-term cost not reduced**
  - **Analysis**
    - **Definite Economic Ramifications, but**
      - Very difficult to calculate Economic Value
      - Not a Favored Rationale for Exemption

2. Unique National Security Concerns

- Liability but no control
  - Could Limit Assignment Flexibility

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Possibility of Exemption (cont.)

- **2nd Possible Basis = Unique National Security Concerns**
  - **Requires a SECAF Determination that:**
    - **will result in a substantial impairment to mission; or**
    - **a compromise of classified operations or property**
- **Analysis**
  - **Commander Left with Liability but no control**
    - Could Limit Assignment Flexibility

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Summary

- **Issues**
  1. **Applicability of Domestic Sewage Exclusion**
  2. **Continued Permit Responsibility**